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IN THE

Supreme Court of the United States

OCTOBER TERM, 1963

No. 650

JAMES B. BOREN,

Petitioner,

v.

HONORABLE EDWARD C. McLEAN, United States District Judge for the Southern District of New York,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

RICHARD H. WELS,
341 Madison Avenue,
New York 17, N. Y.,
Counsel for Petitioner.

249 Press of Fremont Payne, Inc., 80 Washington St., N. Y.—BOwling Green 9-8153

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HONORABLE EDWARD C. McLEAN, United States District Judge for the Southern District of New York,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioner prays that a writ of certiorari issue to review the decision of the United States Court of Appeals for the Second Circuit, entered October 31, 1963.

Opinions Below

The decision of the United States Court of Appeals for the Second Circuit entered October 31, 1963, was without opinion and appears at Appendix B hereto. The opinion of the United States District Court for the Southern District of New York, in *United States* v. *Benjamin Goldstein et al.* (63 Cr. 397), entered August 12, 1963, also appears at Appendix B hereto.

Jurisdiction

Petitioner James B. Boren moved in the United States District Court for the Southern District of New York, pursuant to Rule 21(b) of the Federal Rules of Criminal Procedure, for a transfer of venue to the Northern District of Texas so far as he was concerned. Such motion was denied and he thereafter applied to the Court of Appeals for the Second Circuit for a Writ of Mandamus or Prohibition, or both pursuant to 18 U.S.C. § 1651. Such application was denied.

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

Questions Presented

1. Whether a United States District Judge, in determining whether a transfer of proceedings as to one individual defendant would be "in the interest of justice" under Rule 21(b) of the Federal Rules of Criminal Procedure, is required to give heavy and dispositive weight to the fact that the proposed transferee district is the home of such individual defendant, that the financial circumstances of such defendant precludes him from bearing the expense of bringing character and other witnesses from Texas to New York and from bearing the expense of conducting the defense of a lengthy criminal action far away from home, and that the trial jury will have to resolve a conflict in testimony between such defendant and another person, both of whom have resided for many years in such transferee district?

2. Whether a United States District Judge, in determining whether such a transfer of proceedings would be in the "interest of justice" may, under such circumstances, deny an application for such a transfer as to such defendant, on the ground that granting such transfer would

require the Government to try the case twice, once in Texas against such defendant, and once in New York against the other defendants.

3. Whether it was an abuse of discretion for a United States District Judge, under such circumstances, to deny a transfer of proceedings as to such defendant, and at the same time, direct a severance for four other defendants, directing a separate trial for such four other defendants, so that, although denying the application for a transfer on the ground that the Government should not be required to try the case twice, the District Judge nevertheless ordered two separate trials of the same case.

Constitutional Provisions, Statutes, and Rules Involved

The constitutional provisions, statutes, rules and regulations involved are listed below, and are printed in Appendix A.

Constitutional Provisions

Constitution of the United States
- Article III, Section 2, Clause 3
- Sixth Amendment

Statutes

Securities Act of 1933
- Title 15, United States Code, Section 77e(a)(2)
- Title 15, United States Code, Section 77x
- Title 15, United States Code, Section 77q(a)

Criminal Code
- Title 18, United States Code, Section 2
- Title 18, United States Code, Section 371
- Title 18, United States Code, Section 3237(a)

Rules

Federal Rules of Criminal Procedure
Rule 21(b)

Statement of the Case

Petitioner was named as a defendant, in a thirteen count indictment handed down by a grand jury in Federal District Court for the Southern District of New York, alleging conspiracy to violate the Securities Act of 1933, 15 U.S.C. §§ 77(e)(a), 77q(a), 77x, 77i(a), 77ff(a); the mail fraud statute, 18 U.S.C., § 1341; and § 1343 and to defraud the United States by impeding the governmental functions of the S.E.C.

Petitioner, for more than twenty years, resided in Wichita Falls, Texas, and its vicinity, where he has been a well known and eminent citizen, serving during such period as the president of Midwestern University, located in Wichita Falls, Texas. He and his wife were born in Texas, where they and their three grown children have spent most of their lives. Most of his friends and relatives live there. He has had for many years a lawyer in Wichita Falls. His principal banking connections have been with the First National Bank of Wichita Falls. His connection with the Southern District of New York has been slight and minimal, consisting only of occasional short trips there. He has never resided in New York or in the east.

In the latter part of 1957, petitioner and a number of persons associated with him (including one Charles E. Collins of Wichita Falls, Texas, named as a co-conspirator, but not as a defendant, in the indictment here) acquired a controlling interest in Mono-Kearsarge Consolidated Mining Company, a company whose shares were listed on the Salt Lake Stock Exchange. The affairs of Mono-Kearsarge were in a moribund condition, and the company was close to extinction. Petitioner proposed to transfer to the com-

pany, in exchange for the control bloc of stock, a number of oil and gas properties in Texas and Oklahoma, and to develop the company through the acquisition and development of oil and gas acreage and interests in producing wells. Upon the consummation of such an agreement, and the acquisition of such shares, various oil and gas properties in Texas and Oklahoma were turned over to the company.

At the same time Charles E. Collins of Wichita Falls, Texas, was elected president and a director of the company, and Harold McInroe, also of Wichita Falls, Texas, was elected secretary-treasurer of the company. At the same time the company took an office in the Hamilton Building in Wichita Falls, Texas, which served as its executive offices and the offices of its president and secretary-treasurer. At the same time the First National Bank of Wichita Falls became the depository of the company. All of its oil and gas operations were conducted from Wichita Falls, Texas, and the books and records relating to such operations were kept and maintained there. Reports to stockholders on the affairs of the company were prepared and written at Wichita Falls, Texas. The Government claims that such reports were fraudulent and an essential part of the scheme charged.

Although the indictment charges that the conspiracy commenced on September 1, 1957, and although the last act charged in the indictment occurred on May 7, 1958, the indictment makes no allegation of any act in the Southern District of New York until April 23, 1958. The only overt acts charged as having been committed by petitioner in the Southern District of New York are stated to have been the attendance of meetings on April 23, 1958, and April 24, 1958.

Nor does the indictment allege a single sale of securities or a single use of the mails directed to a person resident in the Southern District of New York. No claim is or ever

has been made that petitioner ever received any proceeds from the sales of stock which are alleged in the indictment.

Petitioner is possessed of small means. He is now wholly dependent upon his earnings as a Government employee stationed in Lawton, Oklahoma, which is approximately fifty miles from Wichita Falls, Texas. He is employed as an assistant to the Representative in Congress from the Sixth Oklahoma Congressional District, and is in charge of the district office at Lawton, Oklahoma. His weekly net income is $167.15. Wichita Falls, Texas, is approximately 1,500 miles from New York; Lawton, Oklahoma, is approximately the same. The round-trip airplane fare from Wichita Falls is $246.34; from Lawton $229.22. While in New York, petitioner's living expenses will amount to $26.50 per day. The trial of the case will be protracted, the Government having estimated that it will be of two to three months' duration. Thus living expenses alone will be a great burden.

In addition to the expense of living in New York through a trial of such length, during which it is anticipated that petitioner's government salary will be suspended, petitioner requires New York counsel. He is without adequate funds for this purpose; he has already had to sell household furnishings to meet some of such expenses.

Sixteen character witnesses from Texas have volunteered to testify in petitioner's behalf. He wishes to have such witnesses testify; they are well known in Texas, but neither they nor petitioner are known in New York. In addition, twelve other witnesses (all from Texas) are essential to the presentation of a defense on the merits. Petitioner is without the means to bring any of these witnesses from Texas to New York, and to provide for their maintenance there, and their return to Texas. Without them he cannot present an adequate defense, and he lacks the means to bring them. He is without friends or family in New York.

The essential charge against petitioner is that he participated in a public distribution of the common stock of Mono-Kearsarge Consolidated Mining Company. He has denied this in testimony given in the injunction proceedings brought by the Securities and Exchange Commission on the same facts in the United States District Court for the District of Utah, before the SEC, and before the grand jury in the Southern District of New York, where he appeared voluntarily.

A major factor in petitioner's inclusion in this indictment was the appearance before the grand jury of Charles E. Collins of Wichita Falls, Texas, who was named in the indictment as a co-conspirator but not as a defendant. Collins' testimony as to petitioner's participation in such public distribution squarely conflicted with that of petitioner.

It is apparent that the trial jury, as the finders of the facts, must determine whether James B. Boren of Wichita Falls, Texas, or Charles E. Collins, of Wichita Falls, Texas, is telling the truth. Petitioner urges that the interest of justice requires that such a determination be made by jurors from Wichita Falls, Texas, the community in which both men have spent the larger part of their adult lives, and where their respective reputations are known and established.

The indictment contains thirteen counts. The first count is a conspiracy count, charging conspiracy to violate the Securities Act of 1933 (15 U.S.C. §§ 77(e)(a), 77p(a), 77x, 78i(a), 78ff(a); the mail fraud statute, 18 U.S.C. § 1341 and § 1343), and to defraud the United States by impeding the lawful governmental function of the Securities and Exchange Commission.

All defendants (including petitioner, and four other defendants who have been severed for a seperate trial) are named in this conspiracy count. Two of the defendants so severed are named only in the conspiracy count.

All twelve substantive counts charge violations of the Securities Act; all but one of such violations are alleged to have occurred on May 5, 1958. The other such violation—the count as to which does not include petitioner as a defendant—is claimed to have occurred on May 7, 1958. Counts 2 through 9 (in all of which petitioner is named as a defendant) charge violations of the registration provisions of the Securities Act. Counts 10 through 13 charge violations of the fraud provisions of the Securities Act, petitioner being named as a defendant in Counts 10 and 13, but not in Counts 11 and 12.

Each of the twelve substantive counts alleges a use of the mails. None of such counts alleges a use of the mails to an investor or other person in the Southern District of New York. Counts 2 through 9 (the counts which allege violations of the registration requirements of the Securities Act) allege, respectively, the forwarding of stock certificates to investors in, respectively,

East Boston, Massachusetts;
Lancaster, Kentucky;
Scotia, New York;
Swampscott, Massachusetts;
Amarillo, Texas;
Lynn, Massachusetts;
Kensington, Maryland;
Naugatuck, Connecticut;

Counts 10 and 13, in which petitioner is named as a defendant, allege mailings of confirmation slips to investors in, respectively, Prattville, Alabama, and Plymouth, Michigan. Counts 11 and 12, in which no offense is charged against petitioner, allege mailings of such confirmation slips to investors in Charlotte, North Carolina, and Petoskey, Michigan.

The conspiracy count of the indictment charges a conspiracy, alleged to have commenced on September 1, 1957,

to acquire a control bloc of Mono-Kearsarge stock, to prepare and distribute and cause the preparation and distribution of false and misleading printed matter concerning Mono-Kearsarge, calculated and designed to excite the interest of persons to be defrauded and to induce them to purchase such stock. The indictment further alleges that such false and misleading written statements concerned the financial condition, assets, business operations, profits, control, management, prospects, and value of Mono-Kearsarge.

As has been noted, although the indictment alleges that the conspiracy commenced on September 1, 1957, the indictment alleges only overt acts committed in the Southern District of New York, and the first such overt act alleged is stated to have occurred on April 23, 1958.

The bill of particulars furnished by the Government on the demand of petitioner confirmed that in the intervening period, overt acts of a significant character occurred in Texas, and that, if there was a scheme, it was hatched in Texas and not in New York.

Of the 27 overt acts alleged in the indictment to have occurred in the Southern District of New York, 16 consisted of the mailing of stock certificates and confirmation slips to persons outside the Southern District of New York; all of the 12 substantive offenses involved the mailing of stock certificates and confirmation slips to persons outside the Southern District of New York.

The acquisition of the control shares occurred in Salt Lake City, Utah, and Wichita Falls, Texas. The written statements and reports which the indictment claims to have been fraudulent were prepared in Wichita Falls, Texas. The manipulative transactions on the Salt Lake Stock Exchange which the indictment charges to have been part of the scheme occurred in Utah and not in New York. Taken together, the indictment and the bill of particulars indicate

that, if offenses there were, such offenses had their origin in Wichita Falls, Texas, where the headquarters of Mono-Kearsarge was established, from where its operations were conducted, where the allegedly false and fraudulent reports and statements were prepared, and to where the New York defendants journeyed to meet with petitioner and others.

Rule 21(b) of the Federal Rules of Criminal Procedure provides for a transfer of proceedings as to any defendant where (1) the indictment and the bill of particulars show that the offenses charged are prosecutable both in the district in which the indictment was returned, and in the proposed transferee district, and (2) if the Court is satisfied that "in the interest of justice" the cause should be transferred as to such defendant.

In *United States* v. *Cashin*, 281 F. 2d 669 (2d Cir. 1960), the Second Circuit affirmed a decision of the United States District Court for the Southern District of New York in *United States* v. *Olen*, 183 F. Supp. 212 (S.D.N.Y. 1960). The same provisions of the Securities Act were involved in that case and in this; there is a remarkable closeness and similarity in the factual situations.

In *United States* v. *Cashin*, *supra*, the Court held that the gist of the crime charged in that Securities Act indictment was the fraudulent scheme employed in the sale of securities, and not the use of the mails. The Court held that since the general venue statute (18 U.S.C. § 3237(a)) which provides that "any offense against the United States begun in one district and completed in another, or committed in more than one district, may be inquired of and prosecuted of in any district in which such offense was begun, continued or completed" is applicable to Securities Act cases, the offenses were prosecutable in the Southern District of Alabama, where the false financial statements were drawn up, the fraudulent inventory records prepared and other numerous steps taken, as well as in the Southern

District of New York, where the mailings to stockholders took place and the indictment returned. In that case the Court of Appeals affirmed the order of transfer made in the District Court by Judge Cashin.

Petitioner here moved in the District Court for a transfer of such proceedings as to him, pursuant to Rule 21(b) of the Federal Rules of Criminal Procedure, to the United States District Court for the Northern District of Texas. In the District Court, the Government conceded that, assuming the validity of the decision of the Court of Appeals in *United States* v. *Cashin, supra*, the offenses charged were equally prosecutable in the Northern District of Texas, and the District Court noted in its opinion that

> "Assuming, as the government seems to concede, that the offense was committed in the Northern District of Texas, as well as in the Southern District of New York, the question remains as to whether a transfer of the proceeding as against this particular defendant to that District would be in 'the interest of justice'."

On the argument in the Court of Appeals the Government thought better of its concession and there said that, although it still conceded that the conspiracy count and one substantive count were prosecutable in the Northern District of Texas, it had changed its views as to the other counts. Whether this change of position on the part of the Government was a factor in the decision of the Court of Appeals cannot be ascertained since that decision was without opinion.

In denying the motion for transfer, the District Court said:

> "Defendant Boren now lives in Oklahoma, but he formerly lived for many years in Wichita Falls, Texas. There is no doubt that a trial there would be less

expensive for him than a trial in New York, and would probably enable him to call more character witnesses to testify on his behalf. On the other hand, to require the Government to try this case twice, once in New York against the other defendants and a second time in Texas against defendant Boren, would obviously involve considerable duplication of expense and effort. Although the corporation had an office and carried on some of its business in Texas, the allegedly fraudulent scheme to sell its stock which is the basis of this indictment is claimed to have been formed and, to a large extent, carried out in the Southern District of New York. Much more is claimed to have occurred here than in Texas. The government charges that defendant Boren, in New York, participated in the scheme. On balance I conclude that this case is more analogous to *United States* v. *Van Allen*, 28 F.R.D. 329 (S.D.N.Y. 1961), relied upon by the Government, than it is to *United States* v. *Olen*, 183 F. Supp. 212 (S.D.N.Y. 1960), *mandamus denied*, 281 F. 2d 669 (2d Cir. 1960), to which defendant points. See also *United States* v. *Aronson*, Docket No. 27942 (2d Cir. June 6, 1963). In the exercise of the court's discretion, this motion is denied."

Although the District Court took into account that a trial in Texas would be less expensive to petitioner than a trial in New York, it failed to take into account petitioner's financial circumstances and his inability to bear the expense of a trial in New York.

Although the District Court took into account the fact that petitioner would be able to call more character witnesses in Texas than in New York, it failed to take into account his inability to bring any such witnesses to New York. It likewise failed to take into account the circumstance, pointed to by Mr. Justice Murphy in his concurring

opinion in *United States* v. *Johnson*, 323 U. S. 273, 279 (1944), that:

> "Very often the difference between liberty and imprisonment in cases where the direct evidence offered by the government and the defendant is evenly balanced depends upon the presence of character witnesses. The defendant is more likely to obtain their presence in the district of his residence. * * * The inconvenience, expense, and loss of time involved in transplanting these witnesses to testify in trials far removed from their homes are often too great to warrant their use. Moreover, they are likely to lose much of their effectiveness before a distant jury that knows nothing of their reputation."

Although the District Court said that the allegedly fraudulent scheme "is claimed to have been formed and, to a large extent, carried out in the Southern District of New York", the District Court took no note of the fact that, although the indictment alleged that the scheme had its inception on September 1, 1957, the first act alleged to have occurred in the Southern District of New York was alleged to have occurred on April 23, 1958, two weeks before the last act alleged in the indictment and bill of particulars.

Although the District Court refused to grant petitioner's motion for a transfer because of the duplication of effort and expense to the Government in two trials of this indictment, it nevertheless, in the same opinion, and on the consent of the Government, in fact ordered two separate trials of this indictment.

In relying upon *United States* v. *Aronson*, 319 F. 2d 48 (2d Cir. 1963), and *United States* v. *Van Allen*, 28 F.R.D. 329 (S.D.N.Y. 1961), the District Court was relying upon decisions which hold that it suffices to deny a defendant in a criminal case protection which the Criminal Rules

afford him if, at the conclusion of the trial and his conviction, it can be found that the trial was so conducted that he was not manifestly prejudiced by such denial.

Subsequent to the denial of such motion by the District Court, petitioner applied to the United States Court of Appeals for the Second Circuit for a writ of mandamus, or a writ of prohibition, or both, to the Honorable Edward C. McLean, United States District Judge for the Southern District of New York, directing nullification of his order denying such motion of petitioner for a transfer of proceedings, insofar as they related to petitioner, to the United States District Court for the Northern District of Texas. Such petition was argued on October 28, 1963, before the Court of Appeals (Judge Swan, Judge Clark, and Judge Marshall). Such petition was denied without opinion on October 31, 1963.

Reasons for Granting the Writ

For the following reasons, appellant contends that the questions presented are so substantial that the granting of a writ of certiorari by this Court, with briefs on the events and oral argument, is required for their resolution.

1. The Decision Below Conflicts With *United States* v. *Johnson*, 323 U. S. 273 (1944).

The decision below, and the principles upon which it appears to be based, are in conflict with the principles laid down by this Court in *United States* v. *Johnson*, 323 U. S. 273 (1944).

In *United States* v. *Johnson, supra* (decided prior to the issuance of the Federal Rules of Criminal Procedure), this Court held that Federal venue statutes, wherever possible, should be construed so as to afford an accused a trial in the district of his residence. In its opinion, the

Court noted that an awareness on the part of the Framers of the Constitution "of the unfairness and hardship to which trial in an environment alien to the accused exposes him" was responsible for the provision of Article III, section 2, clause 3, that "The Trial of all Crimes * * * shall be held in the State where the said Crimes shall have been committed" and the further provision in the Sixth Amendment requiring trial by an impartial jury of the State and district wherein the crime shall have been committed (p. 275).

The Court there pointed out that utilization of the doctrine of a continuing offense which might be prosecuted in any one of many districts "opens the door to needless hardship to an accused by prosecution remote from home and from appropriate facilities for defense" and also "leads to the appearance of abuses, if not abuses, in the selection of what may deemed to be a tribunal favorable to the prosecution" (p. 275).

In that case this Court laid down a general rule of policy:

> "These are the matters that touch closely the fair administration of criminal justice and public confidence in it, on which it ultimately rests. These are important factors in any consideration of the effective enforcement of the criminal law. They have been adverted to, from time to time, by eminent judges; and Congress has not been unmindful of them. Questions of venue in criminal cases, therefore, are not merely matters of formal legal procedure. They raise deep issues of public policy in the light of which legislation must be construed. If an enactment of Congress equally permits the underlying spirit of the constitutional concern for trial in the vicinage to be respected rather than to be disrespected, construction should go in the direction of constitutional policy even though not commanded by it. * * *

> While it might facilitate the Government's prosecution in a case like this to have its witnesses near the place of trial, there must be balanced against the inconvenience of transporting the Government's witnesses to trial at the place of the sender the serious hardship of defending prosecutions in places remote from home (including the accused's difficulties, financial and otherwise, see R. S. § 878, 28 U.S.C. 656, of marshalling his witnesses), as well as the temptation to abuses, already referred to, in the administration of criminal justice." (pp. 276, 278)

Here the enactments of Congress in fact permit the underlying spirit of the constitutional concern for trial in the vicinage to be respected. Yet a policy of the Securities and Exchange Commission and the Government to prosecute whenever possible Securities Act cases in the Southern District of New York and the bulk of procurement fraud cases in the Eastern District of Pennsylvania initiates a disrespect for that concern and flies in the face of the policy laid down by this Court in *United States* v. *Johnson, supra.* That disrespect becomes compounded by a denial by the District Court of the motion for a transfer "in the exercise of its discretion". See *United States* v. *Aronson, supra; United States* v. *Van Allen,* cited *supra,* page 13.

The action of the Court of Appeals in sustaining the denial by the District Court of the motion for transfer has sanctioned such a departure from the principles laid down by this Court for the administration of criminal justice in *United States* v. *Johnson, supra,* as to call for the exercise by this Court of its power of supervision.

It has become more and more the practice in criminal prosecutions in the District Courts for a denial of motions for change of venue and for discovery, to then deny the issuance of writs and defer review of the appropriateness

of such denial until after trial and conviction, and then, as in *United States* v. *Aronson*, 319 F. 2d 48 (2d Cir., 1963), to say:

> "Whether the convenience of the two defendants would have been better served by a California venue or whether expense to these defendants would have been avoided thereby are questions which must now be answered in the light of the paramount appellate question: Were these defendants deprived of a fair trial as a result of the denial? * * * There was no abuse of discretion. Furthermore, an examination of the record discloses that no prejudice to these defendants resulted from a New York trial." (p. 52)

But the closest examination of the trial record cannot reveal the testimony of the witnesses, character and otherwise, whom the defendant's means could not permit to be brought to New York from Texas to give their testimony, nor can it disclose the lack of familiarity on the part of the New York jurors as to the knowledge or lack of knowledge on the part of the New York jurors as to the reputation of the Texas character witnesses and what they stood for in their home community. Nor can the trial record disclose the inadequate preparation resulting from the location of substantive witnesses in Texas, the location of counsel in New York, and the lack of means to provide the travel expense required for adequate preparation. Like last night's unused hotel room, they have vanished forever and cannot appear in the record.

And approval by the Court of Appeals of a District Court decision which, on one page, denies a defendant's motion for a transfer on the ground that to grant it would cause the inconvenience of two trials, and then, on another page in the same decision, to sever four other defendants, and, on the consent of the Government, to order one trial for such four defendants, and a second trial for other

defendants, is to approve a double standard which has no place in our system of criminal justice. There can be no place in that system for a policy which directs that one standard be applied to the acceptability of two trials, when they result from an application of a defendant, and that another standard be applied to the acceptability of two trials, when they result from the application of the Government.

2. An Important Similar Case Is Pending Before This Court.

There are important similar issues relating to the application of Rule 21(b) of the Federal Rules of Criminal Procedure now pending before this Court.

On June 17, 1963, this Court granted certiorari in *Platt* v. *Minnesota Mining and Manufacturing Company*, 374 U. S. 825 (1962), and that case is now pending. The only questions there presented relate to Rule 21(b) of the Criminal Rules.

Minnesota Mining and Manufacturing Company had been indicted by a Federal Grand Jury in the Eastern District of Illinois, and, as did petitioner here, it made an application to the District Court for a transfer of the proceedings as to it, pursuant to Rule 21(b) of the Federal Rules of Criminal Procedure, to the United States District Court in Minnesota.

Upon the denial by the District Court of such motion, Minnesota Mining and Manufacturing Company sought in the United States Court of Appeals for the Seventh Circuit a writ of mandamus to require the District Court to vacate the order of denial and to require the transfer. This was similar to the writ which petitioner here sought in the Second Circuit.

In *Minnesota Mining and Manufacturing Company* v. *Platt*, 314 F. 2d 369 (7th Cir. 1963), the Court of Appeals

for the Seventh Circuit granted such writ of mandamus against the Chief Judge of the United States District Court for the Eastern District of Illinois, and directed him to vacate the order which had denied the motion for transfer, made pursuant to Rule 21(b). Speaking for the Court, Chief Judge Schnackenberg said:

> "The underlying spirit of the constitutional concern for trial in the vicinage of the defendant, rooted in centuries of Anglo-Saxon jurisprudence, and universally recognized by the Federal courts, is not to be ignored * * * in the case at bar, in addition to the demonstration by proof or admission of the essential elements of convenience, expense and early trial, constituting 'interest of justice' in a civil case, as outlined in *Igoe* (7th Cir., 212 F. 2d 382), this criminal case is impressed with the fundamental historical right of a defendant to be prosecuted in his own environment or district. * * *" (Citation added).

In seeking certiorari in *Platt* v. *Minnesota Mining and Manufacturing Company, supra*, one question the Government stated was presented was: "Is a Federal district judge, in determining whether venue transfer would be in 'interest of justice' under Section 21(b) of the Federal Rules of Criminal Procedure required to give heavy or dispositive weight to the fact that proposed transferee district is the home district of the corporate defendant?"

Apart from the fact that petitioner is an individual and not a corporation, this identical question is presented here. Although corporate defendants may have been more successful with recent motions for transfer under Rule 21(b) than petitioner—see *United States* v. *General Motors Corp.*, 194 F. Supp. 754 (S.D.N.Y. 1961); *Platt* v. *Minnesota Mining and Manufacturing Co., supra*—the principles on which such transfers are based must necessarily have greater weight in the case of an individual defendant than in that of a corporate defendant.

3. The Decisions Below Conflict With *United States* v. *Choate*, 276 F. 2d 724 (7th Cir. 1960).

The affirmance of the decision of the District Court here by the United States Court of Appeals for the Second Circuit appears to be in direct conflict with the decision of the United States Court of Appeals for the Seventh Circuit in *United State* v. *Choate*, 276 F. 2d 724 (7th Cir. 1960).

In both the District Court and the Court of Appeals here petitioner had relied heavily on the decisions of the same courts in *United States* v. *Olen*, *supra*, and *United States* v. *Cashin*, *supra*, in which a transfer had been granted and affirmed.

Although the charges and the basic facts are very similar here and in the *Olen* case, there is a distinguishing feature. In the *Olen* case all defendants sought, and all obtained, a transfer of proceedings from the Southern District of New York to the Southern District of Alabama. Here petitioner is the sole defendant who seeks a transfer to Texas, and there are other defendants.

The District Court, and the Court of Appeals, have apparently lent great weight to this factor, and have held that all of the factors that militate in favor of granting petitioner's motion are outweighed by the fact that, in the event of such a transfer, the Government will have the expense and effort of trying petitioner in Texas, and of trying the other defendants in New York. Thus, the fact of two possible trials in fact becomes the dispositive factor in determining whether the "interest of justice" entitled petitioner to a change of venue.

As has been pointed out, in this case any weight that might otherwise be given to such a consideration would seem to be eliminated by the fact that the Court has, on the consent of the Government, already ordered two trials of this case—by severing four other defendants and ordering a separate and additional trial for them. And the

additional factor of conflicting testimony between petitioner and a co-conspirator, both coming from Wichita Falls, Texas, on the crucial question of petitioner's participation, in itself would seem to cry for a transfer here—although it is a factor completely ignored in the decisions below.

Nevertheless, the apparent decision by the Second Circuit that motions for transfer pursuant to Rule 21(b) will not be deemed to be "in the interest of justice" and will not be granted where made by one defendant in a multi-defendant case is in direct conflict with the language and purpose of the Rule itself, and with the decision of the Seventh Circuit in *United States* v. *Choate, supra.*

In *United States* v. *Choate, supra,* a motion by five out of seven defendants in a criminal case for a transfer had been granted by the District Court. Thereafter, the Government petitioned the Court of Appeals for an order of mandamus to require the trial of all defendants in the same district. In denying the Government's petition for mandamus, Chief Judge Rives, speaking for the Court, said:

> "The words 'as to him' in Rule 21(b) necessarily contemplate the permitting of a separate trial as to separate defendants as provided by Rule 14. See *United States* v. *Erie Basin Metal Products Co.*, 79 F. Supp. at page 882. • • • We conclude that Rule 21(b) is carefully drafted so as to permit the court to act upon the motion of any one defendant or any number of defendants, and, in connection with Rule 14, to sever and transfer the proceeding under each count separately, which charges the commission of the offense in the transferee district."

In *United States* v. *Erie Basin Metal Products Co., Inc., et al.*, 79 F. Supp. 880 (D. C. Md., 1948)—to which reference was made in *United States* v. *Choate, supra*—four of six defendants in a criminal case moved for a transfer under

Rule 21(b), two individual defendants not so moving. The District Court granted the motion, thus leaving four defendants to be tried in one district and two defendants to be tried in another district. In granting this motion for a transfer, Judge Coleman said:

> "As opposed to those considerations, of course the Court has not blinked the circumstances stressed by counsel for the Government which may be created by this removal, namely, that it may involve duplication in one trial of all the testimony taken in another. It may seem that this fact alone makes a transfer definitely against the public interest and the proper adininistration of justice and outweighs the factors favoring removal. However, this Court does not think so, because if under this new Rule No. 21 these defendants are otherwise entitled to transfer and if there are substantial considerations as have been noted relating to facility and economy of trial as respects the individual defendants and without any undue hardship on the Government, this Court feels that it should not hesitate to order the transfer, even though there may be duplication in two separate jurisdictions, of the testimony, in the event that there is a trial on all counts of the indictment in each place with respect to the two different groups of defendants."

In the same vein, Judge Cashin, in *United States* v. *Olen*, *supra*, said:

> "There is, in my view, only one factor which favors the Government, namely, that the United States Attorney's staff in this district obtained the indictment and is familiar with this concededly complex case. I give little weight to this factor, however, since all of the factors impelling me to grant the transfer must have been known to the government very early in its investigation. With knowledge of these factors it chose to continue the proceedings in this district. Un-

der the circumstances the Government will not be heard to complain of what will be duplication of effort by two United States Attorneys." (p. 220)

The history of Rule 21(b), the abuses which it was intended to eliminate through its adoption, and the purposes of its sponsors, have all been carefully delineated by Judge Yankewich in *United States* v. *National City Lines*, 7 F.R.D. 393 (S. D. Calif. Central Div. 1947), a case in which he granted a transfer under Rule 21(b) under circumstances similar to those here.

CONCLUSION

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

RICHARD H. WELS,
Counsel for Petitioner.

New York, N. Y., November 26, 1963.

APPENDIX A

Constitutional Provisions

Constitution of the United States, Article III, Section 2, clause 3:

> "The Trial of all Crimes, except in Cases of Impeachment, shall be by jury; and such Trial shall be held in the State where the said Crimes shall have been committed; but when not committed within any State, the Trial shall be at such Place or Places as the Congress may by Law have directed."

Sixth Amendment:

> "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have previously been ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence."

Statutes

Securities Act of 1933, 15 U.S.C.:

> "§ 77e. Prohibitions relating to interstate commerce and the mails.
>
> (a) Unless a registration statement is in effect as to a security, it shall be unlawful for any person, directly or indirectly—
>
> * * *
>
> (2) to carry or cause to be carried through the mails or in interstate commerce any such security

for the purpose of sale or for delivery after sale, unless accompanied by or preceded by a prospectus that meets the requirements of subsection (a) of section 77j of this title.

§ 77x. Penalties.

Any person who wilfully violates any of the provisions of this subchapter, or the rules and regulations promulgated by the Commission under authority thereof, or any person who wilfully, in a registration statement filed under this subchapter, makes any untrue statement of a material fact or omits to state any material fact required to be stated therein or necessary to make the statements therein not misleading, shall upon conviction be fined not more than $5,000 or imprisoned not more than five years of both.

§ 77q. Fraudulent interstate transactions.

(a) It shall be unlawful for any person in the offer or sale of any securities by the use of any means or instruments of transportation or communication in interstate commerce or by the use of the mails, directly or indirectly—

(1) to employ any device, scheme, or artifice to defraud, or

(2) to obtain money or property by means of any untrue statement of a material fact or any omission to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading, or

(3) to engage in any transaction, practice, or course of business which operates or would operate as a fraud or deceit upon the purchaser.

Appendix A.

Criminal Code, 18 U.S.C.:

"§ 2. Principals

(a) Whoever commits an offense against the United States or aids, abets, counsels, commands, induces or procures its commission, is punishable as a principal.

(b) Whoever willfully causes an act to be done which if directly performed by him or another would be an offense against the United States, is punishable as a principal.

§ 371. Conspiracy to commit offense or to defraud United States.

If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined not more than $10,000 or imprisoned not more than five years, or both.

If, however, the offense, the commission of which is the object of the conspiracy, is a misdemeanor only, the punishment for such conspiracy shall not exceed the maximum punishment provided for such misdemeanor.

(a) Except as otherwise expressly provided by enactment of Congress, any offense against the United States begun in one district and completed in another, or committed in more than one district, may be inquired of and prosecuted in any district in which such offense was begun, continued or completed.

Any offense involving the use of the mails or transportation in interstate or foreign commerce, is a continuing offense and, except as otherwise expressly provided by enactment of Congress, may be inquired of

and prosecuted in any district from, through, or into which such commerce or mail matter moves."

Federal Rules of Criminal Procedure:

"Rule 21. Transfer from the District or Division for Trial

(b) Offense Committed in Two or More Districts or Divisions. The court upon motion of the defendant shall transfer the proceeding as to him to another district or division, if it appears from the indictment or information or from a bill of particulars that the offense was committed in more than one district or division and if the court is satisfied that in the interest of justice the proceeding should be transferred to another district or division in which the commission of the offense is charged.

APPENDIX B

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

DOCKET NO. 28541

JAMES B. BOREN,

Petitioner,

v.

HONORABLE EDWARD C. MCLEAN, United States District Judge for the Southern District of New York,

Respondent.

Before Swan, Clark and Marshall, Circuit Judges.

Petition for writ of mandamus to compel transfer of criminal prosecution.

Petition for writ denied.

T. W. S.,

C. E. C.,

T. M.,

C.JJ.

October 31, 1963.

Appendix B.

UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK.

UNITED STATES OF AMERICA,

against

BENJAMIN GOLDSTEIN, NATHANIEL R. REAL, JAMES B. BOREN, SIDNEY B. JOSEPHSON, JEAN R. VEDITZ, ROBERT B. GRAVIS, JACK RONGER, HAROLD GRILL, MATTHEW STRONG, JEROME GORDON, ALEXANDER BROWN, JOHN E. MORGAN, ARTHUR GEORGE, R. B. GRAVIS, INC., JEAN R. VEDITZ CO., INC.,

Defendants.

McLEAN, D. J.

MOTION FOR DEFENDANT ALEXANDER BROWN

For a Bill of Particulars

Denied except as consented to by the government.

MOTION OF DEFENDANT HAROLD GRILL

For a Bill of Particulars

Item a(iii) granted to the extent of specifying the cities between which the conversation was had.

Item b(i) granted.

Item b(ii) granted to the extent of specifying the city.

Motion otherwise denied except as consented to by the government.

For Inspection of Documents

Motion denied. Rule 16 does not authorize the unrestricted inspection which defendant seeks.

Appendix B.

For a Severance and a Separate Trial

Granted on consent to extent of directing a trial of defendant Grill along with the other salesmen defendants separate from the trial of the so-called "principal defendants."

Motion of Defendant Nathaniel R. Real

For a Bill of Particulars

Item 1(j) granted to the extent of specifying names of such "other persons", if any, presently known to the Department of Justice, who the government claims to have been parties to the conspiracy.

Item 1(m) granted to the extent of specifying approximate dates.

Item 1(t) granted to the extent of specifying names of such "others," if any, presently known to the Department of Justice, who the government claims to have been parties to the conspiracy.

Item 1(u) granted to the extent of specifying the city where the meeting took place.

Motion otherwise denied except as consented to by the government.

Motions of Defendant Jerome Gordon

For a Severance

Granted on consent to the extent of directing a trial of defendant Gordon along with the other salesmen defendants separate from the trial of the so-called "principal defendants."

For a Bill of Particulars

Item 1 granted to the extent of specifying the city in which overt act No. 26 took place.

Appendix B.

Item 2 granted to the extent of specifying the city where the mailing referred to in Count 13 took place.

Motion otherwise denied.

MOTIONS OF DEFENDANTS JEAN R. VEDITZ AND JEAN R. VEDITZ CO., INC.

For a Bill of Particulars

Denied except as consented to by the government.

For a Severance

Denied on the authority of *United States* v. *Diaguardi*, 20 F.R.D. 10 (S.D.N.Y. 1956); *United States* v. *Kahaner*, 203 F. Supp. 78 (S.D.N.Y. 1962), *aff'd* 317 F. 2d 459 (2d Cir. 1963).

TO DISMISS THE INDICTMENT ON THE GROUND OF THE STATUTE OF LIMITATIONS AND LACHES

The indictment was filed on May 2, 1963. The conspiracy count charges an overt act by these defendants on May 5, 1958. Counts 2 through 9 charge substantive acts by these defendants on May 5, 1958. The five-year statute of limitations therefore is not a defense.

18 U.S.C. § 3282;

United States v. *Stromberg*, 22 F.R.D. 513 (S.D.N.Y. 1957), *modified on other grounds*, 268 F. 2d 256 (2d Cir. 1959), *cert. denied*, 361 U.S. 863 (1959).

Laches is not a valid defense against the sovereign.

United States v. *Summerlin*, 310 U.S. 414 (1940).

Motions are denied.

Appendix B.

Motions of Defendant James B. Boren

For a Bill of Particulars

It was stated on the argument that this defendant has accepted a bill of particulars furnished him by the government. Accordingly, this motion is marked withdrawn.

To transfer the proceeding as to him to the United States District Court for the Northern District of Texas, Wichita Falls Division

This motion is made under Rule 21(b). Assuming, as the government seems to concede, that the offense was committed in the Northern District of Texas, as well as in the Southern District of New York, the question remains as to whether a transfer of the proceeding as against this particular defendant to that District would be in "the interest of justice." Defendant Boren now lives in Oklahoma, but he formerly lived for many years in Wichita Falls, Texas. There is no doubt that a trial there would be less expensive for him than a trial in New York, and would probably enable him to call more character witnesses to testify on his behalf. On the other hand, to require the government to try this case twice, once in New York against the other defendants and a second time in Texas against defendant Boren, would obviously involve considerable duplication of expense and effort. Although the corporation had an office and carried on some of its business in Texas, the allegedly fraudulent scheme to sell its stock which is the basis of this indictment is claimed to have been formed and, to a large extent, carried out in the Southern District of New York. Much more is claimed to have occurred here than in Texas. The government charges that defendant Boren, in New York, participated

in the scheme. On balance I conclude that this case is more analogous to *United States* v. *Von Allen*, 28 F.R.D. 329 (S.D.N.Y. 1961), relied upon by the government, than it is to *United States* v. *Olen*, 183 F. Supp. 212 (S.D.N.Y. 1960), *mandamus denied*, 281 F. 2d 669 (2d Cir. 1960), to which defendant points. See also *United States* v. *Aronson*, Docket No. 27942 (2d Cir. June 6, 1963). In the exercise of the court's discretion, this motion is denied.

All bills of particulars to be served within two weeks.

So ordered.

Dated: New York, N. Y., August 12, 1963.

EDWARD C. MCLEAN,
U. S. D. J.

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716-745-64

In the Supreme Court of the United States

OCTOBER TERM, 1963

No. 650

JAMES B. BOREN, PETITIONER

v.

HONORABLE EDWARD C. MCLEAN, UNITED STATES DISTRICT JUDGE FOR THE SOUTHERN DISTRICT OF NEW YORK

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR RESPONDENT IN OPPOSITION

OPINIONS BELOW

The order of the court of appeals denying an application for a writ of mandamus (R. 69; Pet. App. 28) is not reported.[1] The opinion of the district court (R. 56–58; Pet. App. 32–33) is not reported.

JURISDICTION

The order of the court of appeals was entered on October 31, 1963 (R. 69; Pet. App. 28). The petition for a writ of certiorari was filed on November 29,

[1] "R." refers to the certified record of the court of appeals. "Tr." refers to the transcript of hearing on the venue application in the district court, which we are lodging with the Clerk of this Court.

1963. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the court of appeals properly denied a petition for mandamus to review the district court's refusal to transfer the trial of one of 15 defendants in a Securities Act prosecution.

STATEMENT

A thirteen-count indictment filed on May 2, 1963, in the United States District Court for the Southern District of New York charged petitioner and 14 others with having conspired from about September, 1957 to May, 1963 to violate the registration, anti-fraud and anti-manipulation provisions of the Securities Act of 1933, and with having committed certain substantive offenses pursuant to that conspiracy, in violation of 18 U.S.C. 371 and Sections 5 and 17 of the Securities Act of 1933, 15 U.S.C. 77e and 77q (R. 18–31).[2] The offenses related to the sale and delivery of common stock of the Mono-Kearsage Mining Company, a Utah corporation with offices in Salt Lake City, Utah, and Wichita Falls, Texas. The indictment named eight "principal defendants" and seven "salesmen defendants" (R. 61–62). Petitioner, who was a "principal defendant," was charged in the conspiracy and ten substantive counts.

[2] Count 1 charged the conspiracy; counts 2 through 9 charged use of the mails and interstate transportation and communication facilities for the purpose of sale and delivery after sale of unregistered stock; counts 10 through 13 charged use of the mails and interstate transportation and communication facilities in order to defraud or deceive purchasers of securities.

The indictment generally alleged that, without having the stock registered with the Securities and Exchange Commission, petitioner and others offered and sold more than 800,000 shares of the common stock of Mono-Kearsage by means of an intensive local and long-distance telephone and mail sales campaign in which numerous false representations were made. It also alleged that trading was stimulated on the Salt Lake City Stock Exchange so as to give the impression that there was a market for the stock.

In July 1963, petitioner filed a motion under Rule 21(b) of the Federal Rules of Criminal Procedure to transfer the proceeding against him from the Southern District of New York to the Northern District of Texas. He alleged, *inter alia*, that the proposed transferee district had jurisdiction over the alleged offenses; that he was born in Texas and had resided and worked for a number of years in Wichita Falls, Texas, although he was presently working in Oklahoma; that he had never resided in the Southern District of New York; that most of the business operations of Mono-Kearsage had been transacted in Texas; that he expected to call about 28 character and other witnesses, most of whom resided in Texas; and that he would be financially unable to bear the burden of a protracted criminal trial in the Southern District of New York (R. 32–42).

During argument on the motion, government counsel conceded that certain acts in furtherance of the scheme did take place in the Northern District of Texas, but pointed out that the "gist of the crime charged" took place in New York (Tr. 5–6). He

stated that the petitioner physically delivered the stock in New York; that it was transferred to two "boiler rooms" in New York from which it was sold throughout the country; that petitioner was physically present in New York on more than one occasion; that the sales activities all emanated from New York; and that all the principals other than petitioner resided in either New York or New Jersey (Tr. 5–8).

The district court denied petitioner's motion on the grounds (1) that a separate trial against petitioner would "involve considerable duplication of expense and effort," and (2) that the indictment alleged that the scheme to defraud was formed and to a large extent carried out in the Southern District of New York, and that much more was alleged to have occurred in the Southern District of New York than in Texas (R. 57–58; Pet. App. 32–33). With the government's consent, the court ordered a severance as to the four salesmen defendants who were before the court (R. 54–55; Pet. App. 29–30), three others being fugitives at the time.

Petitioner then sought in the court of appeals a writ of mandamus or prohibition to compel a change of venue as to him. In an opposing affidavit, the Assistant United States Attorney stated, *inter alia*, that the government had been in error in conceding in the district court that the Northern District of Texas had jurisdiction over all the offenses charged in the indictment (R. 63). The government's affidavit pointed out that while some of the business of Mono-Kearsage was carried on in Wichita Falls,

Texas, and one unregistered security count charged a mailing to Amarillo, Texas, the "contacts in Wichita Falls, Texas, relate to the Corporate affairs of Mono-Kearsage and not to the crimes charged in the indictment which are centered in New York and to a lesser degree in Salt Lake City, Utah." Hence it concluded that the Northern District of Texas would have jurisdiction only over counts 1, 6, 10 and 13. On October 31, 1963, the court of appeals, after argument, denied the application without opinion (R. 69; Pet. App. 28).

ARGUMENT

There is no occasion for this Court to review the court of appeals' refusal to issue the extraordinary writ of mandamus, whereby petitioner sought to have that court reverse the exercise of discretion by the district court in denying petitioner's motion for a change of venue. The opinion of the district court demonstrates that it carefully considered all the relevant factors. It then decided that, on balance, the interests of justice favored a trial in the Southern District of New York where the offense was principally committed, rather than in the Northern District of Texas, where some corporate affairs were transacted, and where petitioner's witnesses resided. This reasonable exercise of discretion is not a proper subject for mandamus. *Parr* v. *United States*, 351 U.S. 513, 520; *Ratke* v. *Picard*, 283 F. 2d 945 (C.A. 6), certiorari denied, 364 U.S. 927.

1. Assuming that the extraordinary writ of mandamus may occasionally be used to review the denial of a motion to transfer under Rule 21(b), *e.g.*, *Minnesota*

Mining and Manufacturing Co. v. *Platt*, 314 F. 2d 369 (C.A. 7), certiorari granted, 374 U.S. 825, No. 113, this Term, it should certainly not be available as a means of interlocutory review in the ordinary situation when a district court has exercised its discretion within permissible jurisdictional limitations. In the *Minnesota Mining* case, the court of appeals granted relief on a petition for mandamus since the district court, in denying the motion to transfer, had relied upon an "improper factor"—*i.e.*, the likelihood of obtaining a fair and impartial jury in the transferee district. In the absence of such unusual circumstances, mandamus is surely an inappropriate means of review. See *Aday* v. *United States District Court*, 318 F. 2d 588 (C.A. 6), certiorari denied, 375 U.S. 832, No. 355, this Term.

2. In the present case, the district court's exercise of discretion was eminently proper. While recognizing that a trial in Texas would be more convenient and less expensive for petitioner, the court also observed that, according to the government's representation, the alleged offenses were committed primarily in New York. The charges in the indictment did not involve the business affairs of the corporation, which may well have been transacted entirely in Texas and Utah; they concerned the unlawful and fraudulent sales of its stock, which occurred largely in New York. Since the sale was conducted on a nationwide scale from "boiler rooms" located in New York, and since the scheme was allegedly formed in New York, it was "in the interest of justice" to try *all* the conspirators in that district. *Aronson* v. *United States*, 319 F. 2d 48 (C.A. 2), certiorari denied November 18, 1963, No. 422, this Term.

Petitioner's contention that the decision in this case conflicts with *United States* v. *Johnson*, 323 U.S. 273, is frivolous. As this Court noted, the *Johnson* case concerned "the construction of the Federal Denture Act," 323 U.S. at 273, and turned on whether Congress intended to fix venue for criminal prosecutions under that statute in any district where an illegal denture was carried. It patently did not establish the principle, urged by petitioner, that a defendant in a criminal case is entitled to be tried in the district of his residence no matter where his alleged offense has been committed.

3. The district court also denied petitioner's motion because it would result in a "considerable duplication of expense and effort" on the part of the government. This was a permissible and relevant factor to consider in determining whether it would serve "the interest of justice" to grant the relief requested. Petitioner contends that this consideration was "eliminated" because the government consented to a severance of the "salesmen defendants," thereby requiring two separate trials in any event (Pet. 20). The government's agreement to this severance, however, was the product of its experience with similar trials wherein proof of the participation of the principals has differed considerably from the proof relating to the salesmen.[3] Accordingly, the Assistant United States Attorney advised the court that "the government has found in the

[3] See *Aronson* v. *United States*, No. 422, this Term; *Ross* v. *United States*, No. 327, this Term; and *Gordon* v. *United States*, No. 431, this Term, for a situation in which this procedure was followed in similar circumstances.

past that if it severs the salesmen and tries them separately it can dispose of the case in a much more expeditious manner" (Tr. 9).

The same considerations obviously do not apply to a severance of a "principal defendant" such as petitioner. If petitioner's trial were held separately in Texas, substantially the same evidence introduced in New York would have to be presented anew in Texas. Moreover, if petitioner's motion were granted, the result would be three trials arising out of the single conspiracy rather than the two which will now be held.

4. Finally, although this point was not called to the attention of the district court,[4] that court may have been without power to transfer seven of the eleven counts against petitioner. Counts 2–5 and 7–9 charged mailings of unregistered securities from the Southern District of New York to addresses in various states in New England, Maryland and Kentucky. Since the mailings did not move "from, through, or into" the Northern District of Texas, there may have been no jurisdiction in that district over the counts in question. 18 U.S.C. 3237. *United States* v. *Choate*, 276 F. 2d 724, 728–729 (C.A. 5). Transferring the cause to the Northern District of Texas for trial on the four counts over which that court unquestionably has jurisdiction and trying the petitioner on the remaining counts in the Southern District of New York (which may have been the only permissible

[4] While the government did indicate in the district court that it believed that venue would be in the Northern District of Texas, this concession was correctly limited on appeal to the counts which charged a conspiracy, schemes to defraud, and to the one count which charged a mailing to Texas.

method of granting petitioner's request) would burden petitioner as well as the government by requiring petitioner to defend at two trials. The petition for a writ of mandamus was, therefore, properly denied.

CONCLUSION

For the reasons stated, we respectfully submit that the petition for a writ of certiorari should be denied.

ARCHIBALD COX,
Solicitor General.
HERBERT J. MILLER, JR.,
Assistant Attorney General.
BEATRICE ROSENBERG,
RICHARD SCHMUDE,
Attorneys.

DECEMBER 1963.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1963

No. 650

JAMES B. BOREN,

Petitioner,

HONORABLE EDWARD C. McLEAN, United States District Judge for the Southern District of New York,

Respondent.

REPLY BRIEF FOR PETITIONER

RICHARD H. WELLS,
341 Madison Avenue,
New York 17, N. Y.,
Counsel for Petitioner.

24 Press of Fremont Frank, Inc., 80 Washington St., N. Y.—Bowling Green 9-8111

In the

Supreme Court of the United States

OCTOBER TERM, 1963

No. 650

James B. Boren,

Petitioner,

v.

Honorable Edward C. McLean, United States District Judge for the Southern District of New York,

Respondent.

The Statement by the Government in its Brief does not completely and accurately set forth the facts in this case. It does not reflect the matters contained in the Bill of Particulars furnished by the Government, although Rule 21(b) provides that such a bill of particulars shall be considered on an application for a transfer. See pages 9 and 16 of the Petition for Certiorari.

Commencing on page 2 of its Brief and thereafter, the Government attempts, wholly without foundation in law, to create an illusory concept of two classes of defendants, one of "principal defendant" and the other of "salesman defendant". Title 18 U.S.C. § 2, specifically provides that "whoever commits an offense against the United States, or aids, abets, counsels, commands, induces or procures its commission, is punishable as a principal." No statute, no rule, no indictment, and no Bill of Particulars distinguishes between "principal defendants" and others. There are no second-class defendants any more than there are second-class citizens. All those named are named equally as defendants. The Government's device of segregating the defendants into categories is contrived to rationalize the fact that a severance and separate trial

have in fact already been ordered in this case, and has no statutory basis. Convenience of the Government, justified by its "experience" in easing its burden of proof (Respondent's brief, pp. 7 and 8), justifies to the Government severance for these "salesman defendants", but the Government cannot find justification in the protection of the Constitutional rights of the Petitioner.

In an effort to make it appear that there is no similarity of questions presented here and in *Minnesota Mining* v. *Platt*, the Solicitor General attempts to distinguish the Government's own use of the Writ of Mandamus in that case, 314 F. 2d 369 (7th Cir. 1963), on the basis that in such case the issue was the "unusual" one of the ability to obtain a "fair and impartial jury" in the transferee district. Such summary of the "issue" in such case was put otherwise by the Solicitor General in the Petition for Certiorari by the Government in that case. In such Petition, the question presented was said to be:

> "Is a Federal district judge, in determining whether venue transfer would be in 'interest of justice' under Section 21(b) of the Federal Rules of Criminal Procedure required to give heavy or dispositive weight to the fact that the proposed transferee district is the home district of the corporate defendant?"

On page 7 of his Brief, the Solicitor General attempts to deny that *United States* v. *Johnson*, 323 U. S. 273 (1944), stands for the general principle that where an enactment of Congress equally permits the underlying spirit of the Constitutional concern for trial in the vicinage to be respected rather than disrespected, construction should go in the direction of Constitutional policy even though not commanded by it. Even though the Second Circuit in *United States* v. *Cashin*, 281 F. 2d 669 (2nd Cir. 1960), and the Seventh Circuit in *Minnesota Mining and Manufacturing Company* v. *Platt*, 314 F. 2d 369 (7th Cir. 1963) and in *United States* v. *Choate*, 276 F. 2d 724 (7th Cir. 1960),

have so read the opinion of this Court in that case, the Solicitor General seeks to narrow its applicability to prosecutions under the Federal Dentures Act.

Moreover, the Solicitor General ignores the following matters crucial to the ability of the Petitioner to receive a proper disposition of the charges against him:

1. The question of the inability to bring to New York available character witnesses, and the tremendous burden of expense of defense in the Southern District of New York, which the Petitioner is unable to sustain (Petition for Certiorari, pp. 13, 17).

2. The issue of the crucial conflict between the witness Collins and the Petitioner (Petition for Certiorari, p. 7).

3. The fact that no mailings were made to the Southern District of New York, and that no investors reside therein (Petition for Certiorari, pp. 8 and 9).

4. The policy of the Department of Justice and the Securities and Exchange Commission to prosecute wherever possible securities cases in the Southern District of New York, regardless of other factors (Petition for Certiorari, p. 16).

5. The relationship of the within case to the *Minnesota Mining* case and *United States v. General Motors Corp.*, 194 F. Supp. 754 (S.D.N.Y. 1964) (Petition for Certiorari, pp. 18-19) and the conflict with *United States v. Choate* and the principle represented thereby (Petition for Certiorari, pp. 20-22).

Respectfully submitted,

RICHARD H. WELLS,
Counsel for Petitioner.

New York, N. Y., January 7, 1964.